No. 376.

Brf. of Mitchell for P. C.

IN THE SUPREME COURT OF THE UNITED STATES.

Filed Oct. 13, 1899.

For the October Term, 1899.

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JAMES H. McKENNEY,
Clerk.

T. O. ABBOTT,
Plaintiff in Error,

vs.

NATIONAL BANK OF COMMERCE OF TACOMA, a corporation; CHESTER THORNE; J. W. WALLACE; EDWARD HUGGINS; W. H. BOGLE, and CHARLES RICHARDSON, partners as BOGLE & RICHARDSON.
Defendants in Error.

No. 376.

Writ of Error to the Supreme Court of the State of Washington.

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

W. C. SHARPSTEIN,
Of Counsel for Plaintiff in Error.

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STATEMENT OF THE CASE.

The ground of defendants' motion to dismiss the writ of error herein is that "the judgment or decree from which the said writ of error purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to-wit: the Supreme Court of the state of Washington." (Defendants' brief, p. 3.) We fail to see why this is any ground for dismissal. The writ of error is always to the highest court of the state in which a decision could be had, and it cannot be the intention of counsel to contend that the Supreme Court of the state of Washington is not

the highest court in the state. The motion is without meaning, but as their brief discloses the objection which they doubtless intended to raise by the motion we shall assume that the objection to the jurisdiction of the court is based on the fact that we do not complain of any *statute* of the state but of a *decision* of a court of the state as being in conflict with the Federal Constitution.

Because of the conceded novelty of the question on which it is sought to have the opinion of this court i. e. that reputation and the right to recover damages for injury to it is "property" within the meaning of that term in the Fourteenth Amendment we shall devote more space to the discussion of the several questions incident to the consideration of the main question than perhaps is necessary.

The facts as stated by counsel for defendants in error while correct, are nevertheless expressed from the standpoint of an adversary and do not therefore present the case quite as satisfactorily as we would wish. Re-stated succinctly they are as follows:— In 1895 the defendant, National Bank of Commerce, at the instance of the other defendants who were its directors and attorneys, instituted a suit in the United States Circuit Court for the District of Washington, against three of its former directors to recover for losses alleged to have been suffered by it on account of loans made by said directors. In its bill of complaint it alleged that the plaintiff in error was one of the persons to whom such loans had been made and in substance charged that the plaintiff was insolvent

when the several loans were made; that he had never repaid them and that it lost on account of said loans a sum in excess of $40,000.

Plaintiff in error thereupon instituted an action in the Superior Court of the State of Washington against defendants in error to recover damages for the defamatory statements made of and concerning him in said bill of complaint and charged that said statements were untrue; that defendants in error had no reasonable cause to believe them to be true, and in fact they knew them to be untrue and that the said statements were not pertinent, relevant or material to said cause of action.

Defendants in error answered by pleading that the language of which plaintiff complained was contained in said bill of complaint and not otherwise; that the court in which it was filed had jurisdiction of the parties thereto and of the subject matter of the action, and that the language complained of was pertinent, relevant and material to the issues. They also denied that it was not true and pleaded affirmatively that it was true and was alleged in good faith believing it to be true.

Plaintiff replied and after denying these allegations alleged: "THAT HE WAS NOT AND IS NOT A PARTY TO SAID ACTION IN WHICH SAID COMPLAINT WAS SO FILED, AND THAT HE IS NOT BOUND BY ANY PROCEEDING OR ALLEGED PROCEEDING THEREIN, NOR BY ANY ORDERS OR DECREES THEREIN, AND THAT HIS RIGHTS CANNOT BE DETERMINED IN ANY MANNER THEREBY, AND THAT ANY ATTEMPT TO DEPRIVE HIM OF HIS

RIGHTS OR HIS PROPERTY BY ANY PROCESS THEREIN OR THEREUNDER, IS CONTRARY TO AND IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE STATE OF WASHINGTON, AND OF SECTION 1 OF ARTICLE XIV, OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES."

On motion for judgment on the pleadings "because the complaint does not state facts sufficient to constitute a cause for action" and that "the matters alleged to be libellous are privileged," the court entered judgment dismissing the action.

The cause was appealed to the Supreme Court of the State and that court affirmed the judgment of the lower court. The court did not notice the Federal question invoked by plaintiff, although it was argued in his brief, but gave its reasons as follows:

"The doctrine of privileged communications rests upon public policy 'which looks to the free and unfettered administration of justice, though as an incidental result, it may in some instances afford an immunity to the evil-disposed and malignant slanderer.'

"It appearing that the words of which the plaintiff complains were used in a pleading filed in a court of competent jurisdiction and that they were pertinent and material, we conclude that they fall within that class of communications which the law regards as absolutely privileged, and the judgment must be affirmed."

ARGUMENT.

The grounds on which the jurisdiction of this court is sought by plaintiff in error have been sufficiently indicated, but may be restated in the language of Section 709 R. S. U. S. "There was drawn in question the validity of an authority exercised under said state," to-wit, the judgment of a Court of the State of Washington, "on the ground of its being repugnant to the Constitution of the United States," to-wit, the Fourteenth Amendment providing that no state shall deprive any person of life, liberty or property without due process of law, "and the decision of said court was in favor of its validity," to-wit, its said judgment.

Reputation and the Right to Recover Damages for Injury to It is Property.

It is apparent then that the first question to be discussed is whether reputation is property within the meaning of that term in the Fourteenth Amendment. Probably the question has never before been raised in this court, at all events it has not been decided. So far

as we can ascertain it has been noticed by the Supreme Court of Michigan only.

In the case of

Park vs. Detroit Free Press Company, 72 Michigan, 560,

it is said, "*There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection, than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization.*" (p. 566). This was said in a case wherein was under consideration a statute of the state of Michigan which provided "that in suits brought for the publication of libels in any newspaper, only such actual damages as may be proved can be recovered if it appear that the publication was made in good faith and did not involve a criminal charge, was due to mistake, and that a retraction was published." Actual damages were defined "to include all damages the plaintiff may show he has suffered in respect to his property, business, trade, occupation, and no other damages." The Court held that the act was unconstitutional because it granted "to one class of citizens legal exemption from liability for wrongs not granted to others" and that it was "not competent to authorize any person natural or artificial to do wrong to others without answering fully for the wrong." (p. 567).

Attention has recently been drawn to the consideration of the extent to which Lexow committees of the

Insert at the foot of the quotation from Park vs. Detroit Free Press Co., on page 6 of said brief, the case of—

McGee vs. Baumgartner, 80 N. W. Rep., 21, 22.

legislature can go, in their investigations, and in an article under the title of "Legislative Investigating Committees" found in Vol. 3 of Law Notes, page 85, it is said, "*If the committee would take such liberties with tangible private property as they have taken with reputations, could there be any question as to their liability as tresspassers? And there is not a shadow of doubt that reputation is included in one of the trinity of rights secured by the constitutional provision that life, liberty and property shall not be taken without due process of law.*"

The question undoubtedly is a new one, but no presumption should therefore be indulged against the claim now asserted that reputation is property. Prior to the adoption of the Fourteenth Amendment it was only acts of the federal government which deprived persons of life, liberty and property into which this court could inquire.

Barron vs. Baltimore, 7 Peters, 243.
Lavin vs. Bank, 1 Fed. Rep., 641, 652.

Many state courts in defining "property" as found in statutes, have restricted its meaning within very narrow limits. The Fourteenth Amendment was, until the announcement of the decision in the Slaughter House cases, supposed to be limited in its operations to the peculiar people for whose protection it was adopted. Since then this court has never denied relief to any person where the effect of state action was to deprive him of any right without which life, liberty or property could not be fully enjoyed.

We select the language of the late Mr. Justice

Field in the dissenting opinion in the celebrated case of

Munn vs. Illinois, 94 U. S., 113, 136,

chiefly because he was the first to define the scope of the terms life, liberty and property. He says:

"All that is beneficial in property arises from its use and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable and valuable in the title and possession. (p. 141.) * * * "The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law, no state can deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness; and for that reason has not been heretofore, and should never be, construed in any narrow and restricted sense." (p. 141).

"No state 'shall deprive any person of life, liberty or property without due process of law,' says the Fourteenth Amendment to the Constitution. By the term 'life,' as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever

God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

"By the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where any one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment." (pp. 141–2).

The learned jurist must have had in mind the words of Shakespeare, himself a lawyer, put into the mouth of Shylock:

> "You take my house, when you do take the prop
> That doth sustain my house; you take my life,
> When you do take the means whereby I live."

Expressing the same sentiment in other language this Court in the case of

Allgeyer vs. The State of Louisiana, 165 U. S., 587,

Mr. Justice Peckham said: "The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use

them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." (p. 589).

There are other remarks to the same point in the same opinion. Pursuing the quotation in Munn vs. Illinois, Justice Field says: "The same liberal construction which is required for the protection of life and liberty in all particulars in which life and liberty are of any value should be applied to the protection of private property." (p. 142).

A case in point is:

Griffin vs. Wilcox, 21 Ind., 370.

There the facts were that a person was arrested by order of a provost marshal for selling liquor to an enlisted soldier. At the time of the arrest an act of Congress existed which made the fact that the arrest was made by order of the president or under his authority a defense to a prosecution, civil or criminal, for an act done by virtue of such order. The defendant, in an action brought by the plaintiff for damages for false imprisoment, pleaded the act of Congress and the trial Court sustained the plea. The appellate court, however, upon the same line of reasoning which this Court afterwards pursued in the case of *ex parte* Milligan, 4 Wall 2, held that the arrest was illegal because martial law could not exist in

the place where the plaintiff was arrested, and consequently held that the act of Congress was no protection to the defendant; that a cause of action for damages for false imprisonment was property, and, therefore, Congress, because of the Fifth Amendment, providing that no person shall be deprived of life, liberty or property without due process of law, had no power to deprive plaintiff of his right to recover. At the time this decision was rendered the Fourteenth Amendment was not in existence.

This Court has jurisdiction to review judgments based on so-called general law and public policy if the effect of such judgment is to deprive a person of property without due process.

Assuming, then, that reputation and the right to recover damages for injury to it is property, it is clear that this Court has jurisdiction of this cause, for the only way in which a person can be deprived of his right to recover damages for injury to his reputation is by statute or by a decision of a court.

Counsel for defendants in error contend that because the state court decided the case upon principles of general law and on the grounds of public policy, that therefore this Court has no jurisdiction and cites:

Sayward vs. Denny, 158 U. S. 180.,
Sevier vs. Haskell, 14 Wall, 12.

But in the former of these cases the court express-

ly states: "But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial Court when the demurrer to the complaint was overruled or evidence admitted or excluded, or instructions given or refused or in the Supreme Court in disposing of the rulings below." pp. 184-185. "We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the State Courts were led to suppose that plaintiff in error claimed protection under the constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument." (p. 186.)

The balance of the quotation from the above case will be found at the bottom of page 8 of defendants' brief as authority for their contention that this Court will not review decisions of state tribunals in respect to matters of general law. It is quite evident from a reading of the sentence that this part of the opinion was not accurately transcribed by whoever does the work of recording the opinions of the Court. It is apparent that the word "not" was inadvertently omitted after the word "are." The Court is made to say in effect that it cannot review the decisions of state tribunals unless they are absolutely free from error, which is *reductio ad absurdum.* The quotation should read: "The decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated un-

less their conclusions are *not* absolutely free from error." As thus read it is in harmony with what precedes and sustains our position.

In the case at bar plaintiff in error set up a claim to the protection of the constitution in the pleadings filed by him and a decision of the State Court in favor of defendants in error could not have been made without deciding against the claim thus set up.

Chapman vs. Crane, 123 U. S., 541, 548.
Kankauna Water Power Co. vs. Green Bay and M. Canal Co., 142 U. S., 254.

The second case cited by counsel is also not in point for the reason that it was a case which arose before the adoption of the Fourteenth Amendment, and the jurisdiction of this Court was sought because the decision of the State Court was obnoxious to that provision of the constitution providing that "no state shall pass any law impairing the obligation of contracts," and as is pointed out by Mr. Justice Gray in the case of

New Orleans Water Works Company vs. The Louisiana Sugar Refining Company, 125 U. S., 18.

"The prohibition is aimed at the *legislative power* of the state and not at the *decisions of its Courts* or the acts of administrative or executive boards or officers, or the doings of corporations or individuals. This Court, therefore, has no jurisdiction to review a judgment of the highest Court of a State, on the ground

that the obligation of a contract has been impaired unless some legislative act of the state has been upheld by the judgment sought to be reviewed." (p. 30.)

We understand however, that whenever the protection of the Fourteenth Amendment is invoked, it is only necessary to show, that the state through some agency, legislative, executive or judicial, has deprived a person of his property without due process of law.

Thus in the very first case involving deprivation by judicial action

Ex parte Virginia, 100 U. S., 339.

"We have said the prohibitions of the Fourteenth Amendment are addressed to the States. * * * They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with

Insert at the foot of the authorities cited at the top of page 15 the following case:

Iron Mountain R. Co. of Memphis vs. City of Memphis, 96 Fed. Rep., 113, 121, 122; C. C. A., 6th Circuit.

power to annul or to evade it." (pp. 346-347).

To the same effect see

Neal vs. Delaware, 103 U. S., 370.
Scott vs. McNeal, 154 U. S., 34.
Chicago B. & Q. R. Co., vs. Chicago, 166 U. S., 226.

What is Due Process of Law?

And in the last case cited Mr. Justice Harlan speaking for the court defines "due process of law."

"Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was permitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice,—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard,—met the requirement of due process of law.

U. S. vs. Cruikshank, 92 U. S., 542, 554.
Leeper vs. Texas, 139 U. S., 462, 468.
11 Sup. Ct., 577.

But a state may not by any of its agencies, disregard the prohibition of the Fourteenth Amendment. Its

judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form.

This Court, referring to the Fourteenth Amendment, has said: Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation.

Davidson vs. New Orleans, 96 U. S. 97, 102.

"*The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the forteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state, within the meaning of that amendment*," (p. 234, 235.)

In the case of

Hovey vs. Elliott, 167 U. S. 409.

Mr. Justice White speaking for this court says:—"*If the legislative department of the government were to enact a statute conferring the right to condemn a citizen without*

any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department—the source and fountain of justice itself—has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government, sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment to compel obedience to law, and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent." (pp. 417, 418.)

General Law, Common Law and Public Policy, So-Called, Must Be in Harmony With the Provisions of the Federal Constitution.

If it be the contention of counsel that a state court by deciding a case on principles of "general law" or "public policy," so-called, can deprive this Court of jurisdiction to review such decision when it is asserted that the effect of the judgment of the state court is to deprive a person of life, liberty or property without due process of law, it must be on the ground that general law and public policy are of higher dignity than the Constitution.

The Constitution of the United States provides:

"This Constitution * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

"All * * * judicial officers * * * of the several states shall be bound by oath or affirmation to support this Constitution."

Every act of Congress, every state constitution, every act of its legislature and every judgment of the courts, state and federal, must be in harmony with the National Constitution or it violates it.

The common law which by express enactment is in force in the state of Washington is made subordinate to the Constitution of the United States in terms.

"The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

Ballinger's Code of Washington, Sec. 4783.

As for "public policy," the term presupposes some statute or principle of law with which it is in accord. It is no longer in accord with public policy for a state to deprive a person of life, liberty or property without due process of law, for the Fourteenth Amendment is conclusive upon the question of public policy.

With us the Constitution is definite in terms, and can only be altered in the manner which it prescribes. When we adopt a constitution, or amend it, it is the supreme law and everything must be in subordination to it, even though formerly it were in accord with the fundamental law. Hence, so-called "com-

mon law," "general law" and "public policy" are no law when contrary to the Constitution.

If this is not so then it is possible for a state court proceeding upon what it assumes to be principles of general law and public policy to accomplish what is prohibited by the Fourteenth Amendment. This doctrine was invoked in the case of

Scott vs. McNeal, supra,

but this court peremptorily disposed of it by saying that it was not bound by the construction the State court put on its own statutes.

This case is interesting as being a case wherein the state court did not base its decision on any statute, but on principles of general law. In its opinion, 5 Wash., 317, that court said: "The equities of the case seem to be clearly with the defendants, for as the matter appears, appellant wilfully abandoned the property in question, and he certainly had reason to expect that proceedings of the kind would be instituted after a lapse of years in case his relatives and other interested parties should not be able to obtain any information as to his whereabouts."

The court distinctly held that "Our statutes only authorize administration of deceased persons," thus disposing of any notion that there was any statute authorizing administration on the estate of a live person. Its assuming to make the finding of the Probate Court that Scott was dead conclusive evidence of the fact is where the state court violated the Fourteenth Amendment.

In this respect the case is similar to Neal vs. Delaware, *supra*, where the state court disclaimed that its decision was based on any statute and held that the statute was in conflict with the Fourteenth Amendment; yet, nevertheless, the effect of its decision was not different from what it would have been if it had been based on the statute.

Argument on Motion to Affirm.

We might well pause here, for the jurisdiction of the Court to hear the merits of the case has been conclusively shown. Counsel for defendants have, however, moved to affirm in the event that their motion to dismiss is denied. The basis of the motion is that the judgment of the state court is so manifestly right that no argument is required to sustain it.

If this Court had decided the precise question adversely to our contention, or if we had no respectable authority in our favor, our appeal might be deemed frivolous. Otherwise we take it the case will he held for argument on the merits.

We desire to call the attention of the Court to the fact that the record has not been printed, nor do the motion papers contain any part of the record. We understand that under these circumstances the Court will not entertain the motion to affirm.

In view, however, of the motion, we deem it proper to argue the merits fully, and if the Court holds adversely to defendants this portion of our brief can stand as our argument when the case is reached regularly for hearing.

Defamatory Matter Published in the Course of Judicial Proceedings is Not Absolutely Privileged.

It fortunately happens that comparatively early in the history of judicial decision in this country this Court decided the very principle involved in the case at bar, and we rely on that case to secure a reversal.

The precise question in controversy, as already stated, is whether defamatory statements in a pleading in a judicial proceeding of and concerning a third party are absolutely privileged if they were untrue and made in bad faith. Defendants maintain the affimative of this proposition.

It would be a curious and instructive investigation to go through the English decisions and find where the so-called doctrine of absolute privilege was first announced. We shall not now tax the Court with such an excursion, but content ourselves by saying that no English case can be found where the alleged libel was published by a party to an action of a person not a party to the action.

In the case of

White vs. Nicholls, 3 Howard, 266,

the Court had under consideration an alleged libel contained in a communication made to the president concerning a federal officer. It was claimed the publication was privileged. As the opinion written by Justice Daniel is a complete exposition of the law of privileged publication and is cited as the leading case on that subject, we shall quote liberally from it. He says:

"The defense of the defendants in error, the defendants likewise in the Circuit Court, is rested upon grounds forming, it is said, an established exception to the rule in ordinary actions for libel; grounds on which the decision of the Circuit Court is defended in having excluded from the jury, under the declarations in these cases, the writings charged in them as libellous. These writings were offered as evidence of express malice in the defendants. The exception relied on belongs to a class which, in the elementary treatises, and in the decisions upon libel and slander, have been denominated privileged communications or publications. We will consider, in the first place, the peculiar character of such communications, and the extent of their influence upon words or writings as to which, apart from that character, the law will imply malice. Secondly we will examine the burden or obligation imposed by the law upon the party complaining to remove presumptions which might seem to be justified by the occasion of such communications, and to develop their true nature. * * * The exceptions found in the treatises and decisions before alluded to are such as the following:

"1. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; or a letter written confidentially to persons who employed A, as a solicitor, conveying charges injurious to his professional character in the management of certain

concerns which they had intrusted to him, and in which the writer of the letter was also interested. 2. Anything said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.

"But the term 'exceptions' as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actors or transactions placed above the cognizance of the law, absolved from the commands of justice. *It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury legibus soluti; and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good.* The privilege spoken of in the books should, in our opinion, be taken with strong and well defined qualifications. It properly signified this, and nothing more. That the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the

parties, adequate to authorize the conclusion." (pp. 286, 287.)

Following this he examines the English cases, and then proceeds to notice the claim as to judicial proceedings and parliamentary proceedings. After reviewing the English cases he sums up his conclusions in the following language:

"We have thus taken a view of the authorities which treat of the doctrines of slander and libel, and have considered those authorities particularly with reference to the distinction they establish between ordinary instances of slander, written and unwritten, and those which have been styled privileged communications; the peculiar character of which is said to exempt them from inferences which the law has created with respect to those cases that do not partake of that character. Our examination, extended as it may seem to have been, has been called for by the importance of a subject most intimately connected with the rights and happiness of individuals as it is with the quiet and good order of society. The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto. 1. That every publication, either by writing, printing or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher toward the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can

never be required of the party complaining beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognized as privileged communications must be understood as exceptions to this rule, and as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may fairly be presumed to have led to the publication, and therefore, *prima facie*, relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less to be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. *We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a* COURT, *or legislative body, or any other tribunal or authority, although such* COURT, *legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it, and that proof of exprees malice in any written publication, petition, or proceeding libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice.*" (p. 290–1).

Notwithstanding the clear cut language just quoted counsel cites,

Vogel vs. Gruaz, 110 U. S., 311,

as establishing the contrary doctrine. Not only is there no language in the opinion in that case that conflicts with what is said in White vs. Nicholls, but if there had been it would have been out of place as not warranted by the facts before the court.

The facts were that Vogel's testator went to the prosecuting attorney of one of the counties of Illinois while the grand jury was in session for the purpose of having a complaint laid before the grand jury against Gruaz. For this purpose he stated his complaint to the prosecuting attorney. Gruaz learned of what had been said and sued Vogel's testator for slander. On the trial the prosecuting attorney was sworn as a witness and these questions were propounded to him:—

"Q. I will ask if you had any conversation with Dr. Bircher with regard to Gruaz, and if so, when was it? Counsel for defense asked witness if at that time he was occupying the same position he now holds. A. Yes, sir. Q. It was communicated to you while you held that position and were acting in that capacity, whatever was communicated to you by Bircher? A. Yes, sir. (*Defendant's counsel object to the witness testifying to matters disclosed to him by the defendant under the circumstances stated, on the ground that such communications are to be treated as privileged.*) The Court. I will ask the witness if he regarded it professionally as a privileged communication? A. I had never met defendant before. He was introduced to me by a citizen of our place, and he informed me that he wanted to talk with me with regard to a matter he wanted to bring before the grand jury. (Objected to). The Court. I will allow the witness to state what the doctor said on

that occasion. Of course, if he made the communication to the witness in good faith, there would be no malice about it, and I shall instruct the jury to disregard it. The objection is overruled. To which ruling of the court the defendant at the time excepted." pp. 312, 313.

The court then remarks:—

"We are of the opinion that what was said by Bircher to Mr. Cook was an absolutely privileged communication. It was said to Mr. Cook while he was State's attorney, or prosecutor of crimes, for the county, and while he was acting in that capacity. Bircher inquired for the State's attorney, and was introduced to him, and stated to him that he wanted to talk with him about a matter he wanted to bring before the grand jury in regard to Gruaz. He laid the matter before Mr. Cook, and charged Gruaz with having stolen his money and was asked how, and stated how, and inquired of Mr. Cook it there was any law in Illinois by which a man could be prosecuted for that. The grand jury was then in session, and Mr. Cook advised Bircher that he had a good case, and directed him to the grand jury room, and Bircher went before the grand jury. If all this had taken place between Bircher and an attorney consulted by him who did not hold the public position which Mr. Cook did, clearly, the communication would have been privileged, and not to be disclosed against the objection of Bircher. *Under the circumstances shown, Mr. Cook was the professional adviser of Bircher, consulted by him, on a statement of his case, to learn his opinion as to whether there was ground in fact and in law for making an attempt to procure an indictment against Gruaz. The fact that Mr. Cook held the position of public prosecutor, and was not to be paid by Bircher for*

information or advice, did not destroy the relation which the law established between them." pp. 314, 315.

What the court says subsequently as to the duty that every citizen is under to communicate to the proper authorities, any information that he may have as to commissions of offenses against the laws can have no place in the case at bar. The court decided that the communication was privileged on the same ground that it would have been had it been made to his own attorney for the purpose of obtaining advice. The principle is not different where the communication is made to a physician by a patient or by husband to wife or vice versa or by a parishioner to his priest. It is a rule of evidence not of substantive law.

The very case cited by the court in support of its decision,

Worthington vs. Scribner, 109 Mass., 487,

shows conclusively that this was the sole inquiry. For Mr. Justice Gray then a justice of the Massachusetts court said:

"*The question now before us is not one of the law of slander or libel, but of the law of evidence;* not whether the communications of the defendants to the officers of the treasury are so privileged from being considered as slanderous, as to affect the right to maintain an action against the defendants upon or by reason of them; but whether they are privileged in a different sense, so that the courts of justice will not compel or permit their disclosure without the assent of the government to whose officers they were addressed. (p. 493).

It is curious to notice in this connection that the State Supreme Court in the case of

Stewart vs. Major, 17 Wash., 238,

laid down the contrary rule. In the case referred to, the defendant made a complaint to a police office against the plaintiff charging her with fornication. Plaintiff brought her action for slander and defendant pleaded privilege. The Supreme Court in disposing of this plea, quoted, with approval,

Newell on Defamation, Slander and Libel, p. 500,

where the doctrine is laid down that unless the charge is made in good faith and for the honest purpose of bringing about the apprehension and punishment of persons guilty of crime, there is no privilege. It is also interesting to note that the Court cited with approval White vs. Nicholls. It is needless to say the Court held the plea bad.

The late Judge Cooley had so great a reputation as a sound jurist that what he says in his text works is given great weight in all courts. In his work on Constitutional Limitations, sixth edition, page 542, he gives the following as a correct statement of the law as to

"STATEMENTS IN THE COURSE OF JUDICIAL PROCEEDINGS.

"Among the cases which are so absolutely privileged on reasons of public policy that no inquiry into motives is permitted in an action for slander, or libel, is that of a witness giving evidence in the course of judicial proceedings. It is familiar law that no ac-

tion will lie against him at the suit of a party aggrieved by his false testimony, even though malice be charged. The remedy against a dishonest witness is confined to the criminal prosecution for perjury. So what a juror may say to his fellows in the jury room while they are considering their verdict, concerning one of the parties to the suit who has been a witness therein, cannot be the subject of an action for slander. *False accusations, however, contained in the the affidavits or other proceedings, by which a prosecution is commenced for supposed crime, or in any other papers in the course of judicial proceedings, are not so absolutely protected. They are privileged, but the party making them is liable to action, if actual malice be averred or proved.*"

A Stranger to an Action is Protected Against the Publication of Defamatory Matter by a Party.

One has only to examine a standard text book on the law of libel to learn the hopeless confusion of the authorities on the subject of privileged communications. Even in England, where the privilege was first asserted, the authorities are not in accord. Thus, while the general rule is laid down that the occasion gives the privilege and that defamatory statements made in the course of judicial proceedings are absolutely privileged, the cases in which the rule was announced were those where judges, witnesses, or jurors were sued or where the action for libel was between the same persons who were parties to the suit in which it was alleged the libel was published. Not a single English case can be found where the plaintiff was a stranger to the first action and the defendant was a party to that action.

We can readily see why judges, witnesses and jurors should be absolutely privileged. They are present in obedience to law and are acting in the discharge of a public duty. And this is given in every instance as the ground of their immunity.

We can see good reason for denying relief to a person who was a party to the action in which defamatory matter was alleged for the matter if relevant was in issue and upon the decision of that issue depended the judgment of the court. The very matter complained of went to the gist of the action. The evidence for and against the issue is or ought to be the same as it would be in an action of libel between the same parties. The court or jury passes upon the evidence adduced. Each party has had his day in court to support or defend the charge. He is denied no right or privilege when he is precluded from relitigating the same matter.

But a third party as has been pointed out stands in a different position. Not being a party but a stranger to the action, he is not permitted to control the prosecution or defense. Nor can he have process to compel the attendance of witnesses. If the matter is impertinent or irrelevant still it can only be struck out on motion of a party. While the judgment determines the issue as between the parties it does not conclude him. It is not *his* rights that are the subject of the action, so *his rights are not adjudicated.*

But the dicta of the English cases that defamatory matter uttered or published in the course of judicial proceedings is absolutely privileged has led

courts in this country to a repetition of the dicta in the same class of cases. The leading case in this country as before pointed out is White vs. Nicholls and many, in fact most, of the courts have followed that decision and have held that if the statements charged to be defamatory were untrue and their falsity was known the privilege does not exist.

Some other courts dissatisfied with the rule of absolute privilege have made an exception that to be absolutely privileged the matter must be pertinent and relevant to the inquiry or issue.

Plaintiff, it must be constantly borne in mind, was not a party to the action in which the bill of complaint was filed, and defendants were. We shall not therefore consider what courts may have said regarding the existence or non-existence of the privilege in cases where the situation of the parties was different.

There are exactly three cases which have arisen where the conditions are the same as in the case at bar. In one of them,

Ruohs vs. Backer's Next Friend, 6 Heisk (Tenn.,) 395,

the doctrine of absolute privilege was denied. Knowledge of the falsity of the defamatory statement was held to destroy the claim of privilege. Here is what the Court says:

"Although, there are authorities which would, perhaps, sustain the petition to the County Court as falling within the definition of absolutely privileged com-

munications, *this Court is of the opinion that a distinction should be taken between statements made in the course of judicial proceedings relative to the parties thereto and those which relate to strangers to the record; and that the protection of private character, as well as the peace of society, require that imputations against persons having no connection with the judicial proceeding should, even when properly relating to such proceeding be considered as falling within the class of conditionally privileged communications.* It is true, as a general proposition, that a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable. (Townshend on Slander and Libel, 250.) It is equally true that 'for any defamatory matter contained in a pleading in a court of civil jurisdiction no action for libel can, as a general rule, be maintained; the power possessed by the courts to strike out scandalous matter from the proceedings before them, and to punish as for a contempt, being considered a sufficient guarantee against the abuse of this privilege' (*Ibid*, 275, 276.) But the author quoted correctly adds that 'whatever may be the reason, it seems certain that where there is a perversion of the right, the policy steps in and controls the individual right of redress.' *Ibid*, 276–7.

"We hold, therefore, that the allegations contained in the petition are, *prima facie*, privileged, being pertinent to the inquiry sought to be had in the County Court; but that, as the defendant in error was a stranger to the record, such of the allegations, if any, as related to her, are only conditionally privileged,

and that it must be left to a jury to determine whether the plaintiff below is the person referred to in the allegations,and whether they were made in good faith, with probable cause, and under such circumstances as reasonably created a belief in the mind of the plaintiff in error that they were true. If so made, the plaintiff below cannot recover in this action, for there would be neither malice in law nor malice in fact in the publication. If, upon the contrary, the words in the petition had reference to the defendant in error, and were inserted therein without reasonable and probable cause to believe they were true, then the plaintiff below would be entitled to a recovery of damages." (pp. 405-407.)

A case holding directly contrary is:

Runge vs. Franklin, 72 Tex., 585.

That case, however, can be distinguished from the one at bar, for while the plaintiff in that case was not a party to the action in which the defamatory matter was published, he was one of the directors of the corporation which was the defendant in that action, and the action against the corporation was prosecuted on account of the alleged acts of its directors.

As was said by this Court in the case of

Robbins vs. Chicago, 4 Wall, 657,

"parties * * * include all who are directly interested in the subject matter, and who had a right to make defence, control the proceedings, examine and cross-examine witnesses and appeal from the judgment. Persons not having these rights are regarded as

strangers to the cause." (p. 672.)

The Texas court does not notice the distinction and from the sweeping language of the opinion doubtless would have held the same way if the facts had been as they are in the case at bar. We insist however, that there is a distinction for in that case as a director of the company he had the opportunity and power of defending the charges in the very suit in which they were made, he was to all intents and purposes a party.

The only case cited by counsel on the question of privilege aside from Vogel vs. Gruaz, *supra*, is

Wilson vs. Sullivan, 7 S. E., Rep., 274.

As this case was cited by the State Supreme Court in support of its decision we shall notice it briefly. In the very opening statement of the case we learn that "The alleged libelous matter on account of which this action was brought was contained in a sworn bill filed by Wilson against Sullivan."

The parties to the libel suit were therefore the same as in the suit in which the libel was published. Further on the court says: "Generalizing the law of the matter as we understand it and applying the same to this case we hold as follows." * * * "The remedy for one who has been harassed by a malicious and groundless suit where there is any remedy, is not an action for defamation, but for bringing and prosecuting the suit maliciously and without probable cause."

But we ask in all candor what remedy would a

stranger have if not by an action for libel. No suit has been prosecuted against him. It cannot be that a party has a remedy and a stranger none. Confined to the facts of the case the foregoing decision is in harmony with the decisions of several other courts although there are as many courts which hold as between parties there is no absolute privilege.

Kelly vs. Lafitte, 28 La., An. 435.
Randall vs. Hamilton, 45 La. An. 1184.
Forbes vs. Johnson, 11 B. Mon. 52.

Where the Defamatory Matter is Impertinent and Irrelevant the Privilege is not Even Conditional.

The remaining case is

Moore vs. Manufactures National Bank, 123 N. Y., 420.

This case holds that the defamatory matter must have been relevant and material to the issues or there is no privilege. As we contend that the defamatory matter alleged of plaintiff was not pertinent and releyant to the issues in which it was published this case is not an authority against us. The facts are so like those in the case at bar that we state them.

The bank brought suit against the sureties on the bond of its former cashier to recover moneys embezzled by him. The sureties requested the bank to furnish an itemized statement of the alleged shortage which the bank did adding to the statement this remark. "Cash items drawn from the bank by collusion with the teller without the knowledge or author-

ity of the officers of the bank." Moore the plaintiff was the teller referred to. Also the attorneys for the sureties demanded a bill of particulars which was furnished containing the same remark.

The court held that the first statement furnished was not privileged because not made in the course of judicial proceedings. As to the second it held that having been furnished as a bill of particulars as a part of the proceedings in court it was privileged unless it contained impertinent or irrelevant matter. Two of the justices dissented holding that pertinency and relevancy was not the test of the privilege but the occasion. It appears then that the question was thoroughly discussed and the doctrine that to be absolutely privileged the matter must be relevant is the rule of decision in New York. In this connection we note that Mr. Justice Peckham was one of the justices who concurred in the majority opinion. What the court said is so apt that we quote:

"But the incorporation into the publication of the statement that the teller acted in collusion with the cashier was, so far as appears, wholly irrelevant and unnecessary. The teller was not a party to the bond or to the suit. There was no issue which called for an investigation of the teller's conduct. The information that the teller had been in complicity with the cashier was not in response to any inquiry made by the defendant. The information did not on its face explain, or tend to explain, or establish any fact relevant to the defendant's case against the sureties, nor can it be seen how knowledge of the fact communicated would be of advantage to the sureties. If,

upon any ground, the information was relevant or material, as no such ground appears on the face of the publication we are not at liberty to assume its existence. The burden of showing its relevancy, under the circumstances, was upon the defendants. It is not impossible that a narration on the trial of the facts as to the defalcation of the cashier might incidentally involve a disclosure of the acts of the teller, but this did not, we think, justify the defendants in the publication, in advance, of the defamatory matter as to the teller, not, so far as appears, having any relevancy to the liability of the sureties on their bond. *Prima facie* the publication was not privileged. The ordinary consequence follows that malice is presumed from the defamatory nature of the publication and the defendants must rely for their defense upon a justification (which was not attempted) or upon proof in mitigation of damages. p. 427.

Allegations Concerning Plaintiff in Error Were Not Pertinent or Relevant.

We contend that the most serious allegations of defendants' bill of complaint which are claimed to be defamatory are not pertinent or relevant to any issue in the suit. It will, therefore, be necessary to consider the bill of complaint.

The complainant was the National Bank of Commerce, "a banking association organized under and in accordance with the national banking laws of the United States, and located at Tacoma, in Pierce county, in the state of Washington," and the defendants were "citizens of said state and residents in Pierce county."

The Circuit Court of the United States had juris-

diction if a Federal question was involved, and to that extent only. A cause of action Federal in its nature and a cause of action not federal could not, therefore, be united in the same bill.

Chap. 866 1 Sup. R. S. U. S., pp. 611–614.

The bill of complaint, so far as transactions with plaintiff were concerned, charged two distinct causes of action against defendants, its former directors. First, with having loaned to plaintiff in error, in violation of Sec. 5200 R. S. U. S., an amount in excess of one-tenth of its capital stock. As this section is material we quote it:

"The total liabilities to any association, of any perperson, or of any company, corporation, or firm, for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in."

It will be observed that the prohibition is not directed to loans to insolvent persons, but "to any person." Solvency of the borrower does not excuse the directors in making the loan. The penalty is provided in Sec. 5239 R. S. U. S. "In cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

The essential allegation would have been "that the

defendants loaned to plaintiff in error of its funds at one time an amount in excess of one-tenth of its capital stock, to-wit, etc." Anything in excess of this would have been impertinent, irrelevant and immaterial.

What defendants in error, did allege was: "That said Abbott (meaning this plaintiff) "had no property or means of any consequence, and during all the said time (meaning from the year 1888 to 1892, inclusive,)was financially irresponsible and indebted beyond his ability to pay." Then follows the statement that with knowledge of his insolvent condition the defendants loaned him various sums of money, so that at one time they had exceeded the limit and that all this money had been lost.

It requires no argument to show that the liability being statutory the pleading should have conformed to the provisions of the statute, and that any gratuitous allegations were surplusage and, therefore, immaterial, irrelevant and impertinent.

In this connection, see what was said by the Circuit Court respecting the very pleading under discussion.

National Bank of Commerce vs. Wade, 84 Fed., 10.

"If, upon the trial of this case, the facts alleged in the bill should be proved, then the right of the complainant to recover will depend on on the proper construction and application of these statutes; if the facts, shall not be proved as alleged, the plaintiff must fail, even though it should be made to appear that it has sustained damages by reason of negligence on the part of the defendants."

United States Circuit Court has no Jurisdiction of Remedies Given by Common Law in Action by National Bank where Diversity of Citizenship Does Not Exist.

But the allegation complained of is justified by defendants because the bank was entitled to recover of its former directors on account of their negligence in having made loans to an insolvent. Doubtless the bank had a remedy, but it existed independent of any statute. It was a common law remedy and should have been prosecuted in the State Court. Such is the holding of this Court in

Whittemore vs. Amoskeag Nat. Bank, 134 U. S., 527.

The Circuit Court, not having had jurisdiction of any cause of action unless a Federal question was involved any allegations making a cause of action cognizable in the State Court were impertinent, irrelevant and immaterial to any issue which could be heard or determined by the Circuit Court.

All authorities hold that the court in which the defamatory matter is published must have jurisdiction or there is no privilege; so, on this ground, too, the publication is not privileged. But there is another ground on which the jurisdiction of the Circuit must fail.

Jurisdiction of Actions for Violation of Sec. 5200 R. S. Does not Exist where Forfeiture for such Violation has not been Adjudged at Suit of Comptroller.

Assuming that the directors of a bank are responsible to somebody in some form of action for a violation of the provisions of Sec. 5200 R. S. U. S., it remains to consider who can maintain such suit and under what circumstances. Sec. 5239, before referred to, contains the only remedy prescribed by Congress for violation of the provisions of the banking act.

The section in full is as follows:

"If the directors of any national banking associa- shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

If the provisions of this section had been separated and placed in different parts of the act, there might be good ground for contention that the last provision of the section in no way depended on what precedes.

But when the penalty for violation is not only provided, but also the method of instituting the proceeding for ascertaining the violation, it would seem that the remaining provision as to the liability of the officers who caused such violation, would likewise be dependent on the determination of the action brought to enforce the forfeiture.

At all events several of the Circuit Courts have so held and we cite the cases.

Welles vs. Graves, 41 Fed., 459.
National Exchange Bank vs. Peters, 44 Fed., 13.
Gerner vs. Thompson, 74 Fed., 125.

If these decisions correctly state the law then the Circuit Court had no jurisdiction to entertain the bill of complaint because it was not alleged—indeed the very fact that the action was instituted by the bank itself precluded any allegation—that a violation of the act had been adjudged.

Kennedy vs. Gibson, 8 Wall, 498.
Whittemore vs. Amoskeag National Bank, *supra*.

Judgment of State Court Violated State Constitution.

But there is another phase of the question that must not be lost sight of. In the early English cases the privilege accorded to judicial proceedings was coupled with the privilege claimed by members of parliament for what was said in proceedings in parliament. Public policy was put forth to sanction the claim of privilege. But this absolute privilege afterwards ac-

corded members of parliament as was pointed out by Lord Chief Justice Denman was not recognized till 1689, when the Bill of Rights was adopted. He says in the celebrated case of

Stockdale vs. Hansard, 9 Ad. & E. 1.

"The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly preceived to be indispensible and universally acknowledged," p. 67.

The section of the Bill of Rights referred to is the original of the section found in our Federal and State constitutions.

The Constitution of Washington provides that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Art. 1, Sec. 5. And added this provision, "no member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate." Art. 2, Sec. 17.

The constitution has given the right. If it is abused the person abusing it is responsible. It has relieved members of the legislature from responsibility for the abuse of the right in the case of words spoken in debate. The right is given to every class, but one, on condition. The question is:— Can the legislature extend the exemption to others? If it cannot, certainly the courts cannot. That the legislature cannot we have the authority of the Michigan Supreme Court.

Park vs. Detroit Free Press Co., supra.

And as the constitution binds judges as well as legislators, it is clear that judges cannot create an exempt class.

Recognizing the fact that notwithstanding this extended argument on the merits the court at this time will not reverse the judgment of the State Court, we respectfully submit that both motions made by defendants in error should be denied.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

W. C. SHARPSTEIN,
Of Counsel.

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Clerk

No. 376.

In the Supreme Court
Brief of Shepard for D. C. on m
Of the United States.

Filed OCTOBER TERM, 1899. Oct. 28, 1899.

T. O. ABBOTT,
Plaintiff in Error,
vs.
NATIONAL BANK OF COMMERCE OF TACOMA, a corporation; CHESTER THORNE; J. W. WALLACE; EDWARD HUGGINS; W. H. BOGLE AND CHARLES RICHARDSON, partners as BOGLE & RICHARDSON,
Defendants in Error.
NO. 376.

In Error to the Supreme Court of the State of Washington.

Brief for Defendants in Error on Motion to Strike or Affirm.

Thomas R. Shepard,
W. H. BOGLE,
CHARLES RICHARDSON,
Attorneys for Defendants in Error.
500, 501, 502, 503 National Bank of Commerce Building, Tacoma, Wash., and 301, 302 Burke Building, Seattle, Wash.

Edwin R. Ray, Printer, Tacoma.

In the Supreme Court of the United States

For the.....term, 189..

T. O. ABBOTT, *Plaintiff in Error,* *vs.* NATIONAL BANK OF COMMERCE OF TACOMA, a corporation; CHESTER THORNE; J. W. WALLACE; EDWARD HUGGINS; W. H. BOGLE AND CHARLES RICHARDSON, partners as BOGLE & RICHARDSON, *Defendants in Error.*	NO.....

MOTION TO DISMISS OR AFFIRM.

Comes now the defendants in error, by their attorneys, Messrs. Bogle and Richardson, and moves the court to dismiss the writ of error herein for want of jursidiction, because the judgment or decree from which the said writ or error purports to have been taken is the judgment or decree of the supreme court of one of the United States, to-wit, the supreme court of the State of Washington.

And the said defendants in error, by their counsel aforesaid, also move the court to affirm the said judgment or decree of the supreme court of the State of Washington from which said writ of error was taken, because it is manifest from the record therein that the question upon which such jurisdiction depends is so frivolous as not to need further argument.

W. H. BOGLE,
CHARLES RICHARDSON,
Att'ys for Defendants in Error.
500, 501, 502, 503 National Bank of Commerce Building, Tacoma, Wash., and 301, 302 Burke Building, Seattle, Wash.

In the Supreme Court of the United States

T. O. ABBOTT,
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Defendants in Error.
} NO.....

Brief for Defendants in Error on Motion to Strike or Affirm.

Plaintiff in error brought an action in the superior court of the State of Washington against the defendants in error for damages for an alleged libel averred to have been published by them of and concerning him in a certain pleading filed by the defendants in error in a proceeding in the circuit court of the United States for the district of Washington, wherein the said National Bank of Commerce of Tacoma was complainant, and F. M. Wade, A. F. McClaine and J. C. Weatherred were defendants. The individual defendants in error were alleged to have been directors and attorneys of said banking association, and to have aided, advised and abetted it in said alleged libellous publication. The complaint in the action for the libel alleged that the defamatory matter complained of was false and malicious; that defendants had no probable cause

to believe it to be true; that said supposed defamatory matter was not pertinent nor material to the subject matter of the suit in which the pleading containing it was filed, and that the court in which said pleading was filed had no jurisdiction of the cause of action therein set up; and, further, that the plaintiff was not a party to the action in which the pleading was filed.

The defendants in error, in the third defense set up in their answer, averred that the supposed defamatory matter was used in a certain bill of complaint filed by said National Bank of Commerce against F. M. Wade, A. F. McClaine and J. C. Weatherred, in a cause pending in the circuit court of the United States, District of Washington, and not otherwise, and set out said bill of complaint *in extenso*, and claimed it was privileged.

The plaintiff in error, in reply, admitted that the defamatory matter was used in said pleading, and that said pleading was correctly set out in said answer; but averred that the statements in said pleading concerning the plaintiff were false and malicious, and not relevant nor material to the proceeding in said circuit court, and that said circuit court had no jurisdiction of the proceeding.

Defendants in error thereupon moved for judgment upon the pleadings, in accordance with the course of practice in the state court, upon the ground that it affirmatively appeared from the bill of complaint set out *in extenso* in the answer that the circuit

court of the United States had jurisdiction of the subject matter of said action; and that it also affirmatively appeared from said bill of complaint that the supposed defamatory matter contained therein was relevant and material to the cause of action therein set up; and that, as a matter of law, such pleading was absolutely privileged, whether true or false, malicious or otherwise, and no right of action could be based thereon.

This motion was sustained by the superior court, and judgment final was entered in favor of defendants. Plaintiff in error thereupon appealed to the state supreme court, and upon full hearing and full consideration, that court affirmed the judgment of the lower court. The opinion of the court is reported 56 Pacific Reporter, 376, —— Wash., ——. It will be seen from that opinion that the decision was rested upon questions of general law, the court adopting the rule that words used in the course of a judicial proceeding, pertinent and material to the matter before the court and in a proceeding of which the court has jurisdiction, are absolutely privileged, upon grounds of public policy, regardless of whether they are true or false, used maliciously or in good faith.

I.

The decision of the state court did not draw in question the validity of any statute of the United States, nor any authority exercised under the Federal Constitution; nor did it involve any state statute

which was claimed to be repugnant to the constitution, treatises or laws of the United States. The defense of privilege was sustained upon principles of general law, without reference to any statute or constitutional enactment, state or federal. The record does not show that the plaintiff in error, in the proceedings in the state court, claimed any "title, right, privilege or immunity under the constitution, or any treaty, or statute of, or commission held or authority exercised under the United States", nor that the decision was against any such title, right, privilege or immunity so specially set up and claimed by him.

The only reference to any such right, privilege or immunity made by him in the state court was the general one that the allowance of the plea of privilege as a defense to his action was a violation of the Fourteenth Amendment, and deprived him of his property without due process of law.

Whatever view may be entertained of the soundness of the rule of law enunciated by the state supreme court, holding that pertinent and material statements made in the pleadings in judicial proceedings before a court of competent jurisdiction are absoluteby privileged, it is manifest that there is no federal statute nor constitutional provision which guarantees a citizen immunity from such a defense, nor which confers on him a right to recover damages notwithstanding such privilege. The doctrine of privileged communications, as stated in the state supreme court in this case, rests

upon public policy, "which looks to the free and unfettered administration of justice". Whether the best interests of the citizens of the state will be subserved by allowing free and untrammeled access to its courts by suitors, witnesses and counsel, unfettered by fears of prosecution for libel, is a question of state policy to be determined by the state tribunals. No question of a title, right, privilege or immunity under the Federal Constitution is involved in its determination. Under the general law, as announced in the state supreme court, the plaintiff in error had no right of action; the use and publication of the words complained of under the circumstances shown in the record gave him no right of action under the general laws of the state; consequently he was not "deprived" of any property by the decision. No federal statute creates any right of action for damages suffered from a defamatory publication; if any such right exists, it is by virtue of the common law of the state, or some statute of the state; and, whether in a given case, or in a given state of facts, such right of action does exist is determined by the laws of the state. What those laws are (whether statutory or of common law origin) are questions belonging to the state tribunals. If the state tribunals erroneously decide questions of general law, that fact affords no ground for a writ of error from this court. "The decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

Sayward v. Denny, 158 U. S. 180.
Sevier v. Haskell, 12 Wall. 12.

It not only appears from the record that no title, right, immunity or privilege under federal statutes or the constitution was set up or claimed by the plaintiff in error in the state supreme court, other than the general claim that the allowance of the defense of privilege deprived him of his property and violated the fourteenth amendment, but it is equally apparent that no such title, right, privilege or immunity was set up or claimed by him in the state superior court. There is no suggestion in the pleadings of any right or privilege claimed under federal law save the general one above mentioned. Before this court will entertain writ of error to the state supreme court, it must be shown by the record that some title, right, privilege or immunity under the constitution, or a treaty, or some statute of the United States was specially set up or claimed in the trial court, and that the decision of that court was adverse to such claim.

Spies v. Illinois, 123 U. S. 131, 181.
Miller v. Texas, 153 U. S. 535.

If the allowance of the defense of privilege to an action of this character could in any view be considered as depriving the plaintiff of his property, it certainly cannot be claimed that the proceedings in the state court were not "due process of law", within the meaning of the constitution. Mere error in the decision of the state court, if admitted, would not deprive the pro-

ceeding of its character as due process of law, nor authorize a review thereof by this court.

Kennard v. Louisiana, 92 U. S. 481.
Sayward v. Denny, supra.
Central Land Co. v. Laidley, 159 U. S. 535.
Miller v. Texas, 153 U. S. 535.

The state court held that the circuit court of the United States had jurisdiction of the suit of the banking association against Wade and others; but that decision did not involve the validity of any federal statute, nor any right claimed by plaintiff in error under it, so as to authorize a review by this court.

Schuyler etc. Bank v. Bollong, 150 U. S. 85.
Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.

The adjudication by the state court of the fact that the words complained of were used or published under such circumstances as to give the defendants immunity under the plea of privilege, involved no denial of any right claimed under the fourteenth amendment, although the determination of the question of the jurisdiction of the circuit court of the United States may have involved a consideration of the federal statutes. The decision, in so far as it involved a construction of the banking statutes, sustained those statutes. The plaintiff in error set up no claim to any title, right, privilege or immunity under any federal statute involved in the determination of that colatteral question,

and hence can claim no right to review that decision by writ of error. He does not claim that he had a right of action in this cause by virtue of any federal statute which has been denied him by the state court; nor does he claim that there is any federal statute which gives him immunity from the defense of privilege. No federal law is referred to by him in the proceedings below except the fourteenth amendment; and, as has been often held by this court, that amendment does not entitle a citizen to a writ of error from this court to review a decision of a state court based on principles of general law. It is not sufficient to invoke some provision of the federal constitution; the record must show that some real right or privilege claimed under the constitution or statute was in fact involved and determined adversely to such right so specially set up in the court below.

Fort Smith Ry. v. Merriam, 156 U. S. 478.
Powell v. Brunswick Co., 150 U. S. 433.
Clarke v. McDade, 165 U. S. 168.
Schuyler National Bank v. Bollong, 150 U. S. 85.

II.

ARGUMENT ON MOTION TO AFFIRM.

If the writ of error is not dismissed, we respectfully urge that the judgment of the state supreme court should be affirmed.

I.

If the jurisdiction of this court is maintained on the ground that the finding or decision of the state court to the effect that the circuit court of the United States had jurisdiction of the cause in which the words complained of were used involved a federal question and was adverse to some right or privilege claimed by the plaintiff in error thereunder, we submit that the decision of the state court on that point was so clearly right as to require no further argument. The action in the circuit court was a suit in equity instituted by the National Bank of Commerce, a banking association organized under the national banking laws, against its former officers and managing directors, alleging acts of misfeasance and non-feasance on their part in violation of the restrictions and limitation prescribed by those laws for the management of such institutions, and seeking a recovery for the losses incurred by the association by reason of such violations, as well as by reason of negligent conduct falling short of the measure of diligence prescribed by the banking statutes. Whether the acts charged against such officers constituted violations of the national banking laws or not depended on the

proper construction of those statutes, and presented a federal question which gave the circuit court jurisdiction. The jurisdictional question was presented in that case by demurrer, and the jurisdiction of the court was sustained. See,

Bank v. Wade, 84 Fed. 10.

The very satisfactory opinion rendered by the learned judge in that case makes it unnecessary to enlarge on the question now. But the question before the state court and which it decided was, not whether the facts set up in the bill in equity in the federal court made a technical case upon which that court would grant relief, but whether the circuit court of the United States is a competent court for the trial of causes in equity involving breaches of duty and violations of federal statutes by officers of national banking associations. The averments of the bill in this particular case may have been insufficient to sustain either the federal or the equitable jurisdiction of the court; and yet, if it was a court of competent jurisdiction to try causes of equitable cognizance or causes involving the construction of federal banking statutes, it was a court of competent jurisdiction within the meaning of the rule relating to the privilege in judicial proceedings. It is jurisdiction of the general *subject* that is meant; the privilege obtains although the allegations in the pleadings of the particular case may be insufficient to sustain the jurisdiction or to obtain the relief sought.

Wilson v. Sullivan, (Ga.) 7 S. E. 274,

cited with approval by the state supreme court in the case at bar.

2.

The decision of the state court upon the main question is so abundantly fortified by the authorities there cited, that no argument is needed to sustain it. Indeed, we doubt whether in the whole range of English or American jurisprudence a single reputable authority can be found that denies the privilege under the circumstances found by the state court to exist in this case. The principle upon which the state court placed its decision has been sustained by this court in Vogel v. Gruaz, 110 U. S. 311; and that decision is a complete answer to the proposition that the allowance of the defense of privilege is a deprivation of one's property without due process of law, within the meaning of the fourteenth amendment.

Thos R. Shepard,

W. H. BOGLE,
CHARLES RICHARDSON,
Attorneys for Defendants in Error.

ABBOTT *v.* TACOMA BANK OF COMMERCE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 376. Submitted November 6, 1899. — Decided December 11, 1899.

The plaintiff in error sued the defendants in error in a state court of the State of Washington, to recover damages for a libel alleged to have been contained in the pleadings in a suit against him, instituted by them in the Circuit Court of the United States. The trial court dismissed the action, and its judgment was affirmed by the highest court of the State, which judgment so affirmed, was brought to this court by writ of error. A motion being made to dismiss the action or affirm the judgment below, *Held*, that there was color for the motion to dismiss, and therefore the motion to affirm could be considered; and as the judgment of the court below did not deprive the plaintiff of any right, privilege or immunity secured by the Constitution or laws of the United States, it should be affirmed.

MOTION to dismiss or affirm. The case is stated in the opinion.

Mr. W. H. Bogle and *Mr. Charles Richardson* for the motion.

Mr. John H. Mitchell and *Mr. W. C. Sharpstein*, opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error, Abbott, brought this action in the Superior Court of the State of Washington to recover damages sustained by the plaintiff on account of an alleged libel published against him by the National Bank of Commerce of Tacoma, Washington, and the other individual defendants named.

It appears that in 1895 the defendant bank at the instance of the other defendants as its directors and attorneys instituted a suit in the United States Circuit Court for the District of Washington against three of its former directors to recover certain alleged losses on account of loans made by them. The complaint in that suit alleged that Abbott was one of the per-

sons to whom the loans were made, and among other things charged substantially that he was insolvent when they were made.

In the present action Abbott alleged in his complaint that the statements in reference to him and his financial condition in the other suit were defamatory and untrue; that the defendants not only had no reason to believe them to be true, but knew them to be untrue, and that those statements were not pertinent, relevant or material to the bank's cause of action.

The defendants in their answer averred that the language referred to was contained in the complaint filed by the bank and not otherwise; that the court in which that complaint was filed had jurisdiction of the parties and of the subject-matter of the action; and that the language used was pertinent, relevant and material to the issues, and was in good faith believed by defendants to be true and was true.

In his reply the plaintiff, besides denying the averments of the answer, alleged that he was not a party to the action in which that complaint was filed, was not bound by any proceedings therein, that his rights cannot be determined in any manner thereby, and that "any attempt to deprive him of his rights or his property by any process therein or thereunder is contrary to and in violation of the constitution and laws of the State of Washington, and of section 1 of Article XIV of the Amendments to the Constitution of the United States."

The trial court, on motion for judgment on the pleadings, dismissed the suit upon the ground that the facts stated did not constitute a cause of action and because the matters alleged to be libellous were privileged.

This judgment was affirmed by the Supreme Court of Washington. Among other things that court said: "Whether the Federal court had jurisdiction of the cause in which the pleading was filed, and of the parties thereto, is purely a legal question to be determined from an inspection of the pleading itself. The Federal court overruled a demurrer to the bill which contained the objectionable matter, and we are constrained to hold as did that court that it had jurisdiction. See *National Bank*

of Commerce v. *Wade et al.*, 84 Fed. Rep. 10. We think it requires no argument to demonstrate that the words complained of were pertinent and material to the cause, and the question to be determined is, were they absolutely privileged, regardless of whether they were true or false, used maliciously or in good faith. The doctrine of privileged communications rests upon public policy, 'which looks to the free and unfettered administration of justice, though, as an incidental result, it may, in some instances, afford an immunity to the evil-disposed and malignant slanderer.' *Bartlett* v. *Christhilf*, 69 Maryland, 219. It cannot be doubted that it is a privilege liable to be abused, and its abuse may lead to great hardships; but to give legal sanction to such suits as the present would, we think, give rise to far greater hardships." *Abbott* v. *Nat. Bank of Commerce*, 20 Washington, 552.

Among the errors assigned in this court are that the Supreme Court of Washington erred in affirming the judgment of the Superior Court of Pierce County because the effect of such judgment was to deprive plaintiff in error of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; in holding that the United States Circuit Court for the District of Washington, Western Division, had jurisdiction of the suit brought by the National Bank of Commerce of Tacoma; in holding that the libellous matter contained in the bill of complaint filed in that suit was privileged; and in holding that such matter was pertinent and material to the issue in that suit.

This case is now before us upon motion to dismiss the present writ of error for want of jurisdiction in this court, and, that motion failing, to affirm the judgment below on the ground that the question upon which jurisdiction depends is such as not to need further argument.

The question whether the Circuit Court of the United States had jurisdiction to entertain the suit brought by the National Bank of Commerce was raised in the action brought by the bank and was decided in its favor — the court holding that the case was one arising under the laws of the United States, in that it involved the question whether or not the action

could be maintained under section 5239 of the Revised Statutes before the violation of its provisions had been determined by a proper court in a suit brought for that purpose by the Comptroller of the Currency. *National Bank of Commerce* v. *Wade*, above cited. That section is as follows: "§ 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this Title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper Circuit, District or Territorial Court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in case of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person shall have sustained in consequence of such violation."

The Supreme Court of the State held that the Circuit Court of the United States had authority to entertain the action brought by the bank. But that decision did not bring the case within the clause of the statute giving this court jurisdiction to reëxamine a final judgment or decree in the highest court of the State "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity." Rev. Stat. § 709. The Circuit Court of the United States had authority to judicially determine in the case and for the parties before it whether the action brought by the bank was one arising under the laws of the United States. Its authority in that regard was not and could not have been disputed. But to deny that the bank could bring its action in the Federal court — the bank being located in Washington and the persons sued by it being citizens of that State — was not, within the meaning of section 709, to draw in question "an authority exercised under the United States." Besides, the decision of the same question by the state court was in sup-

port of the jurisdiction of the Circuit Court of the United States. Where the issue is as to the validity of "an authority exercised under the United States," we cannot review its determination by the state court, unless the decision was against the validity of the authority so exercised. As said in *Balt. & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, 223, "the distinction is palpable between a denial of the authority and a denial of a right, title, privilege or immunity claimed under it." *Clough* v. *Curtis*, 134 U. S. 361, 369; *United States* v. *Lynch*, 137 U. S. 280, 286; *Cook County* v. *Calumet &c. Canal & Dock Co.*, 138 U. S. 635, 653.

Nor can we sustain the contention that our jurisdiction may rest on the clause of section 709, "or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity." The authority of the state court to consider and pass upon the question, directly raised in the case before it, as to the jurisdiction of the Circuit Court of the United States on the bank's suit, was not drawn in question. The contention is only that its decision was erroneous.

But this court has jurisdiction under the clause of section 709, "or where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party or authority." The plaintiff did specially set up and claim that reputation was "property," and that the ground on which the state court proceeded, namely, that the alleged libellous matter appeared in a pleading and could not be made the basis of an action for damages deprived him of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

It is true, as suggested by plaintiff in error, that a State may not by any of its agencies, legislative, judicial or executive, disregard the prohibitions of that amendment. But even

if reputation could be deemed property within the meaning of the Fourteenth Amendment, the state court did nothing that could be regarded within the meaning of the Constitution, as depriving the plaintiff of his reputation. It only adjudged that the words used in a pleading in another suit could not be made the foundation of an action for damages. If it erred in so declaring, it was an error as to a matter of general law and involved no question of a Federal nature; still less an error which in any legal sense deprived the plaintiff of his reputation. It left his reputation as it was, and only adjudged that he could not proceed against the defendants, and by judgment and execution take their property in violation of what the court deemed to be the principles of law governing the case.

There was, in our opinion, color for the motion to dismiss, and therefore the motion to affirm may be considered; and as the judgment below did not deprive plaintiff of any right, privilege or immunity secured by the Constitution or laws of the United States, it is

Affirmed.